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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON PETITION FOR REHEARING

EUGENE GRESSMAN,
Attorney for Petitioner,
1730 K Street, N. W.,
Washington 6, D. C.

JOHN A. VASSALLO,
Of Counsel

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The government, at least implicitly, concedes the validity of the reasons which petitioner has advanced for granting rehearing. It rests its opposition on assertions concerning the facts which are decisively belied by the record.

(1) The government stoops to assert that "[t]he motion to strike J.Smith's testimony pursuant to 18 U.S.C. 3500(d) [was not renewed at the second trial". (G. Br. 9-10) In the face of the record, this assertion is, to say the least, astonishing. It is completely refuted most simply by the statement of the Judge at the second trial:

> "... I will incorporate the voir dire as to Rowan in this transcript and I will also adopt Judge Levet's rulings with respect to it, the motions made under 3500 with respect to it insofar as they are applicable here." (8051) (G. Br. 9)

The only motion made "under 2500" at the first trial was to suppress the testimony of Smith on the ground that the destruction of the Rowan notes was the equivalent of non-production (App. 28a).

It is, therefore, abundantly clear that the point was adequately raised below. Indeed, any attempt to belabor this motion any further at the second trial could have led to justified charges that defense counsel were engaging in dilatory tactics.

(2) The government attempts to cast doubts on whether it was established below that the original notes of the narcotics agent were destroyed by him with the specific intent to thwart the Jencks Act. However, based upon ample testimony, the Court found that the agent did have this intent.

That the Court made such a finding is demonstrated by the Court's repeated reference to the existence of the specific intent to thwart the Jencks Act as motive for the agent's destruction of his notes. The trial court's 30-page opinion is devoted wholly to the problem whether the testimony of Smith could be permitted to stand despite the destruction of the original notes with the requisite specific intent. Thus, in his opinion denying petitioner's motion to suppress, the trial judge

(a) stated that the issue to be resolved was that "left open by the Supreme Court in *Campbell v. United States*", 365 U. S. 85 (App. 10a);

(b) relied upon his finding that "[a]t most . . . '[there was] a tacit acquiescence by Rowan's superiors in the destruction of the notes'" in holding that "the Department of Justice should [not] be precluded or estopped from utilizing the testimony of Smith . . . because of the actions taken by subordinate members of the Federal Bureau of Narcotics . . ." (App. 12a);

(c) referred to "Rowan's intention to circumvent the [Jencks] Act however objectionable it may have been"

(App. 14a), but refused to suppress the testimony of Smith on a number of other grounds:

(d) conceded, that *United States* v. *Thomas*, 282 F. 2d 191 (C. A. 2) was distinguishable from this case in that there the Court "found no intent to suppress evidence in the destruction of the agent's original notes." (App. 17a);

(e) ruled that Mr. Justice Frankfurter's expression in his dissenting opinion in the first *Campbell* case that Jencks "statements" not in possession of the government at time of trial may still be produceable where they "are no longer in existence . . . for . . . a reprehensible reason chargeable to the Government" to be inappropriate to this case because the actions of narcotics agents are not "chargeable to the Government." (App. 12a-14a);

Beyond all question, the District Court, in denying petitioner's motion to strike Smith's testimony, accepted the unrefuted fact that Smith's prior statements had been destroyed for the purpose of thwarting the Jencks Act.

(3) In the end, the government relies on precisely the argument most emphasized by the trial judge in denying petitioner's motion to strike Smith's testimony—that "[w]hatever the motive . . . the Jencks Act was not in fact circumvented—[because] Rowan's typewritten report . . . 'was substantially identical to the [destroyed] notes.'" (Gov. Br. 10)

However, the record makes absolutely clear, by the testimony of Rowan, the only person who testified to having seen both the original notes and the subsequent report (Smith denied that Rowan had taken notes of his interviews), that the report produced for the defense differed from the original notes. He added to his report "things that Smith had not told [him]" and "left things out" which he considered to be "unimportant". Rowan also admitted that he "improved" the verbiage and made changes in the narrative form so that the report "wouldn't fall under the Jencks decision". (Pet. 14-15, App. 27-8a)

The government advances the argument that "[n]either the defense nor the prosecution suggested that anything of significance in the notes was omitted from the report."

The suggestion that an accused need rely upon the impartiality and editorial skill of a government agent bent on minimizing a report from production pursuant to 3500, or that, alternatively, he must show that the materials withheld, by reason of their improper destruction at the hands of a government agent, contained matters "of significance" where, by definition, the materials are unavailable for inspection, is surely absurd. If the government's position is sustained it would clearly enable the government to achieve what the narcotics agent expressly desired, namely, to thwart the Jencks Act.

This Court has said that it may be error for an Appellate Court to speculate what an accused's attorney might have found useful for impeachment purposes in *Jencks* statements improperly withheld from an accused, even where the withheld document is available for inspection. *Rosario v. United States*, 360 U. S. 367, 371.

Surely, there is no basis for the suggestion that an accused must convincingly speculate as to what effective use he may have made of a withheld statement, especially where the statement has been destroyed and is therefore not available for inspection by him or by the court.

In any event, it has already been noted by this Court that the withholding from an accused of a witness' prior statements which contain omissions of facts related at trial, or even a contrast in emphasis upon the same facts or a different order of treatment, may be as destructive of the right to cross-examination as the failure to produce a

* The strange absence from the report of any mention of petitioner—despite the unrefuted fact that at the time of its preparation Rowan had, in interviews with Smith, showed him, petitioner's photograph "at least twenty" times (Pet. 14-15)—raises no suspicion in the mind of the government.

statement flatly contradicting the witness' testimony. *Jencks* v. *United States*, 353 U. S. 657, 667.

(4) The government, at least implicitly, concedes that were Smith paid to give testimony in this case, petitioner's conviction, based upon that testimony, would be required to be reversed. However, the government makes the fantastic assertion that Smith "was paid for his undercover work in a dangerous capacity." (G. Br. 14)

This appealing and imaginative version is, alas, pure fiction for which the record furnishes no shred of evidence. Smith's brief "undercover" service in enabling government agents to infiltrate a Canadian based narcotics ring (G. Br. 14) took place in the Spring of 1959. (Pet. App. 11a-13a (opinion of the Court of Appeals)) It ended when Smith and the agents revealed themselves, and terminated their usefulness as "undercover" agents, by testifying. Agent Biase, whom Smith had introduced into the Canadian ring, testified in July, 1959 (3352) and Smith, before a Canadian Rogatory Commission in September, 1959. (App. 24a)

Smith received the large sums of cash in question over a period of two years *after* he had exposed himself as a witness for hire and had terminated his usefulness as an undercover agent. (G. Br. 12; App. 24a) The record shows that the only, indeed, the only possible, purpose of the government's payments to Smith in 1960 and 1961, during which period he was testifying before the Grand Jury and at the first and second trials, was to induce him to give testimony against defendants (including petitioner) not part of the Canadian ring.

The only evidence of the purpose for which the government paid Smith great sums of money during the time he was giving testimony, came from the testimony of agent Rowan and Smith, himself.

At the trial, the government did not dispute agent Rowan's testimony that he was sent to Smith by the Bureau

of Narcotics in January, 1960, for the purpose of "building a [new] case". Agent Rowan testified, without contradiction by his superiors who also testified, that he was authorized by the Bureau to offer Smith $5,000 "if he would testify against some defendants" in this case. Rowan explained to Smith that the government offer was "entirely" unrelated to previous services rendered by Smith in Canada. (App. 24a).

Rowan's uncontradicted testimony that Smith was promised, and later given, additional money by three narcotics agents when Smith at first refused to appear before the Grand Jury and that, in addition, Smith was promised other things of value for his testimony, is more fully related in the Petition. (App. 24a-25a)

Smith himself conceded on cross-examination that the money which he was getting from the government was one of the "prime considerations" which induced him to testify and that he understood, at the first trial, that his testimony could bring a "reward". (App. 25-26a)

Despite the government's suggestion that "other evidence in the record" disproves that Smith was paid large sums of money to give testimony in 1960 and 1961 (G. Br. 11), the only references in its brief to "undercover" work engaged in by Smith are to his activities prior to September 1959. (G. Br. 12, 14) The only "evidence" which the government employs to support its theory that Smith earned the "per diem" after he made impossible his continued service in an undercover capacity by giving testimony against certain Canadians named in this indictment, is a Bureau of Narcotics voucher which is disingenuous on its face, and, at most, covers only a small portion of the sums received by Smith. (G. Br. 13)

The voucher, receipted by Smith, was submitted to the Bureau by an agent who had paid Smith $1,500 prior to his first grand jury appearance in February 1960. (Pet. 6, App. 25a; G. Br. 43) The agent had obtained the $1,500

for "travel and other expenses". (F. Tr. 5203-04) The voucher submitted in support of the expenditure stated that the sum represented a "per diem" paid to Smith for "150 days" from the middle of September 1959 through the end of January, 1960—the period during which he could have done no work in an under-cover capacity. There is no suggestion that he rendered any other services during that period. It was payment for grand-jury testimony and could not have been anything else.

At the trial, further exploration of the nature of Smith's "services" was cut off when the Court sustained the prosecutor's objection based upon irrelevancy. (5206-08) Petitioner's attorney explained:

> "Your Honor, I am trying to establish, and I have a right to establish, that this man [Smith] wasn't working for the Bureau during this time, and if he wasn't working for them he had no right to $300 a month." (F. Tr. 5206)

He was answered by the Court as follows:

> "The Court: I am not going to allow questions as to what services Smith rendered . . . Now, further more, this question would be objectionable for other reasons." (F. Tr. 5207)

The evidence of Rowan that Smith was offered and paid large amounts of money to give testimony, and Smith's evidence that the money paid him was a prime consideration for his giving testimony, is uncontradicted.

The section on which the government relies, 31 U. S. C. 529a (G. Br. 14), furnishes no warrant for its payments for Smith's testimony, and the government makes no attempt to take the payments outside the prohibitions of 31 U. S. C. 529.

(5) Significantly, the government does not dispute the appropriateness of the reasons urged by petitioner for the granting of rehearing. Nor does it dispute the very serious

reflection on the fair administration of justice necessarily cast by the record. Rather, it attempts to raise issues of fact where, as has been demonstrated, there are none, and treats the points raised in a manner which, if appropriate at all, is appropriate to argument on the merits.

Respectfully submitted,

EUGENE GRESSMAN,
Attorney for Petitioner,
1730 K Street, N. W.,
Washington 6, D. C.

JOHN A. VASSALLO,
Of Counsel.